



IN THE COURT OF BANDA ACEH DISTRICT

CASE No 432/PID.SUS/2019/PN BNA

Attorney General's Office of the Republic of Indonesia

vs.

Dr. SAIFUL MAHDI M S.Si., M.Sc Bin (Alm) ABDULLAH

EXPERT OPINION

of ARTICLE 19: Global Campaign for Free Expression

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13 April 2020

Summary

1. This expert opinion is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), as *amicus curiae*, or a related party with an indirect interest in the case of the Defendant, Saiful Mahdi. We understand that the Defendant was charged with violating Article 27 para 3 of Law No. 19/2016 concerning Amendment of Law No. 11/2008 regarding Electronic Transaction Information (ITE). It was launched based on the remarks made by the Defendant to his colleagues at the Faculty of Syiah Kuala University campus Banda Aceh regarding the process for hiring new faculty. In particular, he criticized the procedure for selecting successful candidates from the civil servant test to join the Faculty of Engineering of Unsyiah.
2. The aim of this *amicus curiae* is to inform the District Court of Banda Aceh about international and regional standards on freedom of expression that should be applied in the present case. These include, in particular, standards under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Indonesia acceded to the ICCPR on 23 February 2006, and made no reservations or declarations in relation to the ICCPR's provisions on the rights at issue in this case. Therefore, it is not only bound by the respective provisions of as a matter of international law but is also obliged to give effect to them through national legislation and practice.
3. The *amicus curiae* also includes a review of comparative jurisprudence and best practices around the world related to the respective issues. ARTICLE 19 submits that Indonesian law on defamation should be interpreted to be consistent with the precedents and authoritative statements from international and other national jurisdictions, given the protection afforded to freedom of expression in the Indonesian Constitution.
4. This *amicus curiae* presents the following issues for the considerations of the Court:
 - First, it outlines international freedom of expression standards applicable to the case;
 - Second, it presents the compatibility of domestic criminal defamation legislation with international, regional and comparative standards on freedom of expression;
 - Third, it suggests the correct approach, in line with international human rights standards, to the assessment of the proportionality of restrictions on freedom of expression in this case.
5. In summary, a finding that the defendant was guilty of criminal defamation in this case would run counter not only to the guarantees in the Constitution of the Republic of Indonesia, but also to international human rights standards. These enshrine the right to freedom of expression and promote open public debate, particularly on matters of public concern.

Interest of ARTICLE 19

6. ARTICLE 19 is a global human rights organization, with its international office in London (registered UK charity No. 32741) and several regional offices. The organization takes its name and mandate from Article 19 of the Universal Declaration of Human Rights, which guarantees the right to freedom of opinion and expression and campaigns against censorship in all its forms around the world. Over the years, ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best

practice on freedom of expression issues, including on protection of reputation.¹

7. ARTICLE 19 frequently submits written comments/amicus curiae in cases that raise issues touching on the international guarantee of freedom of expression before regional courts such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court on Human and Peoples' Rights -- as well as to courts in national jurisdictions, including Indonesia. For example, ARTICLE 19 filed a public amicus brief together with other human rights organisations in the Judicial Review of Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Defamation.²

Submissions

a) The importance of a broad interpretation of the right to freedom of expression

8. This case concerns the scope of the right to freedom of expression and the limits on it. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)³ provides the primary legal framework for assessing Indonesia's international obligations with respect to the right to freedom of opinion and expression. The Human Rights Committee (HR Committee), the UN treaty body charged under the ICCPR with supervising its implementation, has explained in its General Comment No. 31 that:⁴

[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level... are in a position to engage the responsibility of the State Party. [...]

It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article... domestic law or practice [must] be changed to meet the standards imposed by the Covenant's substantive guarantees.

9. In addition, pursuant to section 7(2) of Indonesia's Law No 39/1999 on Human Rights, ratified provisions of international treaties which concern human rights automatically become part of domestic Indonesian law. Furthermore, the right to freedom of expression is specifically guaranteed by the Constitution of the Republic of Indonesia, as enshrined under Article 28E.
10. ARTICLE 19 recalls that under international and regional human rights law, the right to freedom of expression is not an absolute right and may be legitimately restricted by the State in certain circumstances. A three-part test sets out the conditions against which any proposed

¹ ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2017, available at <https://bit.ly/333fXKk>. An earlier version of the principles were adopted by a group of highly recognized and respected experts in the area of freedom of expression and protection of reputation, and they have been endorsed by all three special international mandates dealing with freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media, and the Organisation of American States Special Rapporteur on Freedom of Expression – as well as a large number of other organisations and individuals.

² Public Amicus Brief by ARTICLE 19, Amnesty International, Cairo Institute for Human Rights, and Egyptian Initiative for Personal Rights, in the Constitutional Court of Indonesia, Judicial Review of Law No. 1/PNPS/1965 concerning the prevention of religious abuse and/or defamation, available at <https://bit.ly/3aY8TmQ>.

³ International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

⁴ Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 4 and 13 respectively.

restriction must be scrutinised and these requirements also apply to online content:⁵

- **The restriction must be provided by law:** thus, it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate that conduct accordingly.⁶
- **The restriction must pursue a legitimate aim,** of those that are exhaustively enumerated in Article 19 para 3 of the ICCPR, namely: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, and/or the protection of the reputation or rights of others.
- **The restriction must be necessary in a democratic society,** meaning that it must be necessary and proportionate. This requires an assessment of whether the proposed limitation responds to a “pressing social need” and whether the measure is the least restriction method of achieving the objective.

b) Criminal defamation and appropriate remedies

11. On the outset, ARTICLE 19 points out that international and regional human rights authorities have frequently noted the harshness of criminal provisions on defamation. For example, the UN Special Rapporteur on Freedom of Opinion and Expression stated in 2008:

The subjective character of many defamation laws, their overly broad scope and their application within criminal law have turned them into a powerful mechanism to stifle investigative journalism and silent criticism.⁷

12. The UN Special Rapporteur has emphasised that civil libel provides an adequate remedy when there has been an unjustified attack on one’s reputation. In a Joint Declaration with the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media in 2002, the UN Special Rapporteur affirmed that:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁸

13. There is increasing recognition that criminal defamation laws are incompatible with international standards on freedom of expression and various parts of the UN system have condemned criminal defamation laws. The UN Human Rights Committee in its General Comment No. 34 calls on states to consider decriminalising defamation and notes that imprisonment is never an appropriate penalty.⁹ Additionally, a number of international and regional organisations have called for reform of defamation laws. Most notably:

- UNESCO has adopted numerous declarations recommending the repeal of criminal

⁵ C.f. e.g. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 43.

⁶ *Ibid.*, paras 24-25. See also European Court of Human Rights (European Court), *The Sunday Times v United Kingdom*, App. No. 6538/74, 26 April 1979, para 49.

⁷ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14, Feb. 28, 2008, para 39.

⁸ *The 2002 Joint Declaration* of UN Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media of 10 December 2002.

⁹ General Comment No. 34, para 47.

defamation laws.¹⁰ The Washington Declaration adopted in May 2011 calls on UNESCO member states to “ensure a legal environment in which free speech is encouraged, and penalized neither by onerous defamation laws, nor excessive monetary penalties.”¹¹ The Doha Declaration of May 2009 also calls on UNESCO member states “to remove statutes on defamation from penal codes.”¹²

- The European Court of Human Rights (the European Court) has criticised the use of criminal defamation and held that prison sentences must not be awarded, nor must there be any other suspension or restriction of the right to freedom of expression. More specifically, the European Court has consistently held that any prison sentence in a defamation case will constitute a violation of the right to freedom of expression under article 19 of the European Convention on Human Rights, irrespective of whether the finding of liability was justified.¹³ Furthermore, if criminal defamation is applied, the criminal standard of proof (i.e. beyond a reasonable doubt) must be fully satisfied.
- The Inter-American Court for Human Rights has also clearly stated that criminal prosecutions for the exercise of the right to freedom of expression may only be brought in exceptional cases where there is an absolute necessity to resort to such measures.¹⁴ It has also highlighted that criminal proceedings will usually be an unnecessary and disproportionate response to expression because criminal law “is the most restrictive and harshest means to establish liability for an illegal conduct.”¹⁵
- The African Court on Human and Peoples’ Rights has also held that custodial sanctions for speech will amount to a violation of the right to freedom of expression except in “serious and very exceptional circumstances ... for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion, or nationality.”¹⁶ Similarly, most recently, the Court of Justice of the Economic Community of West African States, addressing the criminal defamation and sedition statutes of The Gambia concluded, following a broad survey of international jurisprudence, that: “the jurisprudence of freedom of expression suggests that the erosion of freedom of expression by indirect means as the [criminal defamation and sedition] provisions seem to have done suggests that a finding of violation is obvious. The existence of criminal defamation and insult or sedition laws are indeed unacceptable instances of gross violation of free speech and freedom of expression. It restricts the right of access to public information.”¹⁷

14. ARTICLE 19 also notes that an increasing number of states have either decriminalised defamation or significantly curtailed its use with a movement towards decriminalization, including Argentina, Mexico, Georgia, Ghana, UK, Ireland, the Maldives, Sri Lanka and Togo, and most recently Burkina-Faso,¹⁸ South Africa¹⁹ and Zimbabwe.²⁰ As demonstrated by the

¹⁰ Dakar Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2005.

¹¹ Washington Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2011.

¹² Doha Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2009.

¹³ See e.g. European Court, *Belpietro v Italy*, App. No. 43612/10, 24 September 2013.

¹⁴ Inter-American Court for Human Rights, *Kimel v. Argentina*, 2 May 2008 (Merits, Reparations and Costs), para 78.

¹⁵ *Ibid.*, para 76.

¹⁶ African Court on Human and Peoples’ Rights, *Lohé Issa Konaté v. Republic of Burkina Faso*, Application No. 004/2013, [165].

¹⁷ The Court of Justice of the Economic Community of West African States, *Federation of African Journalists and ors v. Republic of The Gambia*, ECW/CCJ/JUD/04/18, p.40.

¹⁸ In Burkina Faso, a new press Code was adopted in September 2015; fines replaced imprisonment as a sanction for defamation or the dissemination of false news; see BBC, Burkina: The New Criminal Code, 5 September 2015.

¹⁹ In September 2015, the ANC has taken a stance against criminal defamation, which should be followed by legislative action; see D. Milo, *The Case Against Criminal Defamation*, 29 September 2015.

²⁰ The Constitutional Court of Zimbabwe, *Madanhire and Another v The Attorney General*, Judgment No CCZ 2/14.

successful repeal of criminal defamation laws in an increasing number of countries, it is unnecessary to rely upon criminal law to protect reputation and maintain public order.²¹

15. Hence, ARTICLE 19 urges this Court, in the light of the foregoing, to start from the premise that the existence of criminal liability *per se* in the domestic legislation is not justified. All instances of criminal penalties constitute disproportionate punishments for reputational harm and should be abolished.

c) Proportionality of criminal defamation

16. Even if the Court finds that criminal liability can in principle amount to a justified restriction on the right to freedom of expression in certain circumstances, ARTICLE 19 submits that this Court needs to consider whether criminal defamation can be considered proportionate measures necessary in a democratic society, in particular where
 - The subject matter of the impugned speech concerns an expression of opinion; and/or
 - The subject matter of the impugned statement concerned an institutional process, hence on matters of public interest.

Expressions of opinion benefit from enhanced protection

17. ARTICLE 19 submits that it is well established under international law that opinions are entitled to enhanced protection under the guarantee of the right to freedom of expression. Both regional and national courts typically distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former.
18. ARTICLE 19 takes the view that no one should be liable for a statement of opinion, defined as a statement which cannot be shown to be true or false or which cannot reasonably be interpreted as stating a fact (for example because it is rhetoric, satire or jest).²² Opinions are by definition subjective in nature and courts should not judge whether or not it is appropriate to articulate them. Furthermore, no one should be required to prove the truth of a statement of opinion, or value judgement. At a minimum, such statements should benefit from enhanced protection.
19. In addition, the Human Rights Committee has stated that “communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion”²³ [Emphasis added].
20. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has similarly stated that permissible limitations in Article 19(3) of the ICCPR “are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements”.²⁴

²¹ Civil defamation and criminal incitement laws are sufficient; it is possible to draft and implement them effectively in order to achieve appropriate protections for freedom of expression. At the same time, compensation in civil cases should be proportionate, in order not to have a chilling effect on freedom of expression and information.

²² ARTICLE 19, Defining Defamation, *op.cit.*, Principle 10.

²³ UN Human Rights Committee, General Comment 25, UN Doc CCPR/C/21/Rev.1/Add/7 (1996) para 25.

²⁴ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, 28 February 2008 A/HRC/7/14, para 85.

21. This has been recognized in various regional and national courts. For example, the European Court held in *Lingens v. Austria* that value-judgments must be carefully distinguished from assertions of fact. In that case, the Court noted that the journalist at issue was covering political issues that were of public interest to Austrians and that censoring the articles would deter other journalists from contributing to public discussion. The Court emphasised that

[A] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof... As regards value-judgments, this requirement [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself.²⁵

22. ARTICLE 19 also notes that in some instances of expression of opinions, strong words and harsh criticism are to be tolerated, perhaps even to be expected, especially in matters of public controversy or public interest. Furthermore, courts have interpreted the term “opinion” very liberally and allowed the defence of opinion to be defeated only where it is clear that the defendant did not actually hold the views expressed. In *Sokolowski v Poland*, the European Court had to consider a statement to the effect that a local municipal councillor was “tak[ing] away” money from the local townspeople by electing himself to a paid position on a local election committee.²⁶ Finding that the statement constituted protected expression of opinion rather than a factual assertion, the Court held that “a serious of accusation of theft cannot...be justifiably read into such a statement.”²⁷
23. ARTICLE 19 invites this Court to apply these standards in the present case. In an analogous fashion to the cases above, the statements challenged in the present case should not be understood as factual assertions of misconduct or illegality. In ARTICLE 19’s view, they should be understood as expressions of opinion by the Defendant concerning the university’s hiring procedure and the university’s administration of an important test.

Statements in public interest

24. ARTICLE 19 further submits that it is well-established under international law that statements on matters of public concern deserve enhanced protection due to the key role they play in safeguarding democracy and the overall public interest.
25. The need for enhanced protection for statements on matters of public interest has also been explicitly recognised in the specific context of defamation laws by the United Nations Special Rapporteur on Freedom of Opinion and Expression stated that “defamation laws should reflect the importance of open debate about matters of public concern.”²⁸
26. Courts around the world, international and national, are assiduous in protecting statements on the matters of public concern. Although the protection is afforded to the speaker, the reason why considerable latitude should be afforded to public debate on issues of public importance is because *the public is entitled to receive such information*. For example:

²⁵ European Court, *Lingens v. Austria*, App. No. 9815/82, 8 July 1986, para 46.

²⁶ European Court, *Sokolowski v. Poland*, App. No. 75955/01, 29 March 2005, para 48.

²⁷ *Ibid.*

²⁸ Promotion and protection of the right to freedom of opinion and expression, 18 January 2000, E/CN.4/2000/63, para 52.

- The United Nations Special Rapporteur on Freedom of Opinion and Expression (UN Special Rapporteur), stated that “defamation laws should reflect the importance of open debate about matters of public concern.”²⁹
 - The European Court has also upheld this principle, stating that, “there is little scope [...] for restrictions on political speech or debates on questions of public interest.”³⁰ For example, the European Court found that enhanced freedom of expression considerations were very much in play in relation to McDonalds, the multinational fast food restaurant chain, holding that criticism of its environmental and labour policies fell squarely within the scope of the enhanced protection for statements on matters of public concern.³¹ The European Court stated that “in a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.”³²
 - Similar conclusions were made by the Inter-American Court and the East African Court of Justice.³³
 - The Hong Kong Court of Final Appeal, too, has recognised the fundamentally public role of certain private corporations, stating in a 2003 case: “Here, we have a prominent figure in the business community, vice-chairman of a public company [who sold his entire share in the company over the space of one week]. This is plainly a matter of public interest, and worthy of comment by persons in the media.”³⁴
27. ARTICLE 19 also notes that defamation, as it has been applied from its origins in English law, may be described as the publication of matter, through speech or in writing, “injurious to the good fame and reputation of another.”³⁵ It is a fundamental principle of defamation law that the objective is only to protect the individual right to a reputation. Defamation is only actionable when the claimant can show damage to *herself or himself* as the natural and probable result of the words expressed by the defendant.³⁶ In other words, as held by many courts, it must be possible for a reasonable person to discern that a defamatory statement refers to the claimant, either through the explicit mention of that person’s name or a detailed description that clearly makes reference to that person.³⁷ Furthermore, statements about a group or class of people generally are not actionable by individual members of that group or class, unless there is reason to understand that the reference is to an individual member of that class/group (e.g. because the group/class is very small).³⁸

28. ARTICLE 19 submits that the comments of the Defendant in the present case concerned the

²⁹ *Ibid.*, para 52.

³⁰ European Court, *Dichand and Others v. Austria*, App. No. 29271/95, 26 February 2002, para 39.

³¹ European Court, *Steel and Morris v. United Kingdom*, App. No. 68416/01, 2005, para 88.

³² *Ibid.*, para 89. See also the 2005 Joint Declaration of the Special Rapporteurs for the African Commission on Human and Peoples’ Rights and the Organization of American States, 28 February 2005, noting that “all members of society must be free to discuss issues of public interest and participate freely in public debates without fear of reprisal ... in the form of ... judicial measures.”

³³ See e.g. the Inter-American Court, *Herrera-Ulloa v. Costa Rica*, 2 July 2004 (Preliminary Objections, Merits, Reparations and Costs), [199]; *Ivcher-Bronstein*, 6 February 2001, [150]; the East African Court of Justice, *Managing Editor of Mseto v. Tanzania*, Ref No 7 of 2016, 21 June 2018.

³⁴ *Next Magazine Publishing Ltd v. Ma Ching Fat*, 5 March 2003, Final Appeal No. 5 of 2002, para 36.

³⁵ See e.g. Townsend, C., & Haig, A. (1891). *The English Law Governing the Right of Criticism and Fair Comment*. *The American Law Register* (1852-1891), 39(8), 517-565. doi:10.2307/3305353, p. 517.

³⁶ *Ibid.*, p. 518.

³⁷ Restatement (2d) of Torts, § 564A (1977).

³⁸ *Ibid.*, citing to *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

university and hiring procedure – he did not name or refer to any person. Furthermore, a reasonable person reading his opinion would not infer that he was making reference to any specific individual. This is therefore not an instance where the reputation of a person has been infringed and is therefore actionable in defamation. The Defendant's statements also constitute expression of opinion on matters of public concern. Regardless of one's views on the challenged statements, it is critical to allow this type of discussion to occur.

Conclusions

29. Freedom of expression has been recognised as a basic precondition for a functional democracy, and indeed human progress and development. The free flow of information and ideas is essential and there is little scope under Article 19(3) of the ICCPR for restrictions on political speech, on expression of opinion or on debate on questions of public interest.
30. ARTICLE 19 submits that criminal defamation in Indonesia should be abolished, hence the Court should not apply the provisions in the present case. In any case, the challenged statements in this case amount to opinions, which benefit from a high degree of protection from regional and national courts under the guarantee of freedom of expression. They represent the Defendant's personal views on the hiring process of the university and the administration of civil service exams. It also seems to all appearances that the Defendant honestly and genuinely holds these opinions. As such, these statements would be protected against defamation liability under international law and by many national courts.
31. ARTICLE 19 suggests that a finding against the Defendant in this case would represent a very serious setback for freedom of expression in Indonesia. The consequence is likely to be a serious chilling effect on freedom of expression, to the detriment of the Indonesian public as a whole. Dismissing criminal charges against the Defendant, on the other hand, would send a clear signal, both within Indonesia and around the world, that the country is strongly committed to democracy and human rights, and protection of the right to freedom of expression.
32. This is the opinion of ARTICLE 19, submitted by the undersigned, and is subject to the decision of this Court.



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